SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1898.

No. 268.

S. ENDICOTT PEABODY,
vs.
UNITED STATES.

Appeal from Court of Private Land Claims.

STATEMENT OF FACTS.

In this case there are no disputed questions of fact to be considered. A small amount of evidence was taken on behalf of the government which might indicate some controversy as to the location on the earth's surface of the natural objects which are the boundaries of the grant claimed; but, as the court below never passed on this question, and as it will be proper to remand the case for further proceedings if the decree of that court be vacated, that question is not necessarily before the court for examination at this time. The court of private land claims held in effect that there was no grant, or rather that there was no satisfactory evidence of any grant, but it is not clear from the record whether the adverse decree was based upon a

supposed failure to prove the actual making of the grant, or upon a supposed lack of power in the authorities by which it was made.

The Spanish papers put in evidence by appellant to show the making of the grant, are three in number, although, as printed in the record at pages 38 to 40, they appear to be but one single document.

The first paper contains a petition dated February 23, 1824, addressed to the constitutional alcalde of Abiquiu, Don Francisco Trujillo, signed by Jose Rafael Samora, asking for himself and 25 others, residents of the district of Ojo Caliente, a grant of land in the Vallecito de Lovato. This petition bears the appearance of being an original paper. On the same paper following the petition is a short certificate signed with the name Francisco Trujillo and dated February 24, 1824, setting out that the petitioners own no property. The testimony of Mr. William Tipton, an expert as to such papers and handwriting, at page 38 of the record seems to indicate that this certificate may not have been signed by the alcalde himself. However that may be, the act of juridical possession, to which reference will be hereafter made, is shown by the testimony of the same witness undoubtedly to have been executed by the alcalde, and it is upon that paper that reliance is placed as evidence of the making of the grant.

The next paper put in evidence is evidently a first draft or retained copy of an order by the governor, and is not signed. This appears at the top of page 39 in Spanish and on pages 41-2 of the record, in English. An examination of the original paper, which counsel for appellant hopes to have before the court when this case is argued, will show that in two places words have been stricken out and in one place an interlineation has been made, which facts strongly indicate that this was a rough draft of the order which was afterwards made. In official Spanish documents

interlineations and erasures are very seldom found, and must be regarded as unauthorized interpolations or changes unless attention is called to them in some way by the officer signing the document, but it is not uncommon to find in the archives such drafts of papers as this now under consideration. The last paragraph of this document in which the governor charges the alcalde to treat the unfortunate petitioners with charity and to charge them for his work according to their poverty rather than according to the existing fee-bill, is written on the margin of the paper.

The third paper is the act of juridical possession executed by Francisco Trujillo which recites that he acted under the authority of an order of Don Bartolome Baca, political chief of the province, given at Santa Fe on the 27th day of February, 1824, upon the petition presented by Jose Rafael Samora and his associates. Whatever may have become of the order finally signed by the governor, and whether it was actually the same as the rough draft referred to, can not be considered as important, as the official act of the alcalde recites the making of the order, and all three of these papers come from the official archives which were turned over to our government by the Mexican authorities, and have been in the office of the Surveyor General of New Mexico, certainly ever since that office was organized in 1855.

The facts as to repeated spoliations of the official archives at Santa Fe, both under the Mexican and American governments, have been so frequently presented to the court of private land claims and as well to this court, that judicial notice thereof may be taken. The genuineness of the act of possession is clearly proved, however, by the testimony of Mr. Tipton at pages 35-6 of the printed record, where he testifies that none of the documents in the archives have ever been questioned as to genuineness, and that the signature to the act of possession is the same as that on archives

numbered 387 and 1189 which appear to be official reports of the alcalde, Trujillo, both made in 1824. It is expected that these papers will also be before the court for examination.

By the act of possession it appears that the alcalde measured off land to each of the grantees, giving no names except Samora's, fifty varas to some, 100 varas to others and 125 varas to Samora, as principal petitioner, with which they were satisfied, leaving free, from the little ford and cuestecita (small hill) as it is called, for a public watering place, and the middle of the little canon as far as the lands which are called those of Juan Benito Sanchez, leaving 150 varas for the plaza, the said land being included within certain boundaries which are natural objects, specifically named. It is not shown when the possession was delivered, but presumably it was shortly after the order was made. The act of possession is dated the 22d of September, 1824, at Abiquiu, which is many miles from the Vallecito.

There was also put in evidence, but not by this appellant, another paper which purports to be a list of the persons who comprised this grant of the Vallecito; but this paper is not dated, certified or identified in any way, nor does it by any internal evidence appear to be connected with the other papers. This will be apparent from its mere inspection. It is possibly a list, made at a much later date, of people living in the Vallecito, but when, by whom or for what purpose, does not appear. The alcalde in the act of possession certifies that he measured off 50 or 100 varas of land to different persons while this list seems to indicate the possession by different people of much larger amounts of land. It was clearly not made by the alcalde or under his direction.

It was shown by evidence that the people put in possession in 1824, and their descendants and successors in title, have remained in possession down to the pres–

ent time, claiming the land within the boundaries set out in the act of possession, with the possible exception of a short interval about the year 1844, when they were temporarily driven away by Indians.

A number of deeds were introduced in evidence, the earliest being in 1830, which show at least continued assertion by different persons of ownership of land under the grant. Reference to those deeds will show that they specifically declare that the land was held by royal possession as appears by the grant ("como costa por la merced"), and in in some of them the boundaries given refer to the grant, setting out that the land sold is bounded on the east or the west by the limits of the grant. The language used in the deeds also show an intention to convey something more than the mere pieces of land described as they in terms convey the "*fuero, domicilio y vecindad.*" An examination of the meaning of these terms, especially of the word *fuero*, will show the evident intent of the grantor to convey rights beyond and outside of the strip of land described. This distinction was well understood under the former governments, no such language being used in cases where the intention was to convey only a piece of land without other right or title.

There were also put in evidence the Spanish papers showing the making of the Petaca grant in 1836, twelve years after the Vallecito grant was made, in which the existence of the earlier grant is recognized by the act of possession executed by the alcalde thereunto authorized by the governor, the Vallecito grant being given as the western boundary of the Petaca.

It will be apparent from the foregoing statement that the claimants must rely principally upon the undoubted act of juridical possession for evidence of the making of the grant by the governor. The familiar doctrine of presumption in favor of the regularity of official acts is undoubtedly applicable.

There were three cases filed in the court of private land claims to obtain the confirmation of this grant. The first of these was by Merejildo Martinez and a number of others, claiming to be the heirs at law and legal representatives of Jose Rafael Samora and his associates; the second was filed by the present appellant claiming to be the successor in interest of Jose Rafael Samora and praying for a confirmation to the legal representatives of Samora and his associates; and the third by Antonio Trujillo and another, claiming to be the owners of an interest in the tract of land by purchase from the heirs of three grantees, and praying for a confirmation to the petitioners as the legal representatives of the original grantees. These three cases were consolidated in the court of private land claims for the purposes of trial, which trial resulted in the decree which appears at page 98 of the printed record. From this decree the present appellant alone took an appeal.

The appellant makes the following assignment of errors:

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ASSIGNMENT OF ERRORS.

Now comes the said appellant by his solicitor and says to the court that there is manifest error in the record and decree of this cause, and specifies the following as errors therein:

First: The court below erred in holding that the petition had not been sustained by satisfactory proof.

Second: The court below erred in holding that the title asserted in the court below had not been sustained by satisfactory proof.

Third: The court below erred in holding that the title asserted to the tract of land described in the petition, was of no validity.

Fourth: The court below erred in holding that the grant or possession claimed was not such a one as the United States are bound to recognize and confirm.

Wherefore appellant prays that the decree of the court below be reversed, vacated and set aside, that decree of confirmation be entered in this court, or that such other order and decree be made as to this court shall seem proper.

F. W. CLANCY,
Solicitor for Appellant.

POINTS AND AUTHORITIES.

I.

The act of possession is satisfactory proof of the making of the grant.

The act of possession recites that the alcalde acts by virtue of the decree of the political chief, made on the 27th of February, 1824, and while that order can not now be produced yet it must be held that it was sufficient to authorize what was done by the alcalde who delivered the possession. It has been repeatedly held by this court that the acts of an officer to whom a public duty is assigned, are *prima facie* taken to be within his power, and that he who challenges the fact, takes on himself the burden of showing that the officer has transcended the powers conferred upon him.

Strother vs. Lucas, 12 Peters, 437-8.

United States vs. Peralta, 19 How., 347.

The failure to produce the order of the governor, under the peculiar circumstances existing in New Mexico which have made it impossible to consider the Spanish and Mexican archives and records as complete or as controlling, can not be imputed to these claimants as arguing a failure of proof. It is absolutely impossible at this late day for anyone to say what has become of the order of the political chief, but under the principle above invoked the burden of proof is upon the government to show lack of authority in the alcalde.

The nature, character and importance of delivery of juridical possession under the Spanish and Mexican governments have been declared by this court. This

proceeding has all the force and efficacy of a judicial determination, involved the ascertainment and settlement of the boundaries of the lands, and bound the former government and is equally binding upon the officers of our government.

United States vs. Pico, 5 Wallace, 539.
Graham vs. United States, 4 Wallacn, 259.
Van Reynegan vs. Bolton, 95 U. S., 33.
Malarin vs. U. S., 1 Wallace, 282.

II.

The long unbroken possession under a claim of a grant is sufficient proof upon which to base a presumption of the making and ratification of the grant as claimed.

This court has always attached great importance to the fact of long-continued possession under a claim of grant in cases where the grant was imperfect or the evidence adduced in its support was defective or secondary in character.

United States vs. Rocha, 9 Wall., 646.
United States vs. De Haro, 22 How., 297-8.
United States vs. Chavez, 159 U. S., 463-4.

In the case last cited the facts are not unlike those of the present case but there was very much less of evidence. No documentary proof was presented as to the making of the grant, but old men testified that the town of Cubero was settled in the year 1833, that possession had been had ever since, that the settlers had in their possession a written grant from the governor, that lands were distributed among the settlers, and that there was a tradition that one Hernandez had stolen or carried away the title papers of the grant. The record also showed the existence of a dispute between these settlers and the Pueblo of Laguna as to boundaries, which dispute appears to have extended from 1835 to 1841; and a number of

deeds were put in evidence variously dated from 1841 to 1856, showing sales of parcels of the lands. In the present case we have an equal amount of evidence of this character, and have also the undoubted act of juridical possession which shows the beginning of the grant. This court, in the Cubero case, said that it was scarcely necessary to consider the question of long-continued possession because there was ample evidence from which to find that the settlers had been put in juridical possession under a grant from the governor of New Mexico. In the present case there is direct and positive documentary evidence that the settlers were put in juridical possession under such a grant. The court, however, goes on to declare that a grant will be presumed upon proof of adverse, exclusive and uninterrupted possession for twenty years, and that while it is true that nothing can be claimed by prescription which owes its origin to, and can only be had by, a matter of record, yet lapse of time accompanied by acts done or other circumstances, may warrant the presumption of a grant by record.

III.

The power of the New Mexican authorities to make a grant in February, 1824, ought not to be doubted.

This court has repeatedly decided that while the court was under the dominion of Spain, governors had authority to make grants, and such power continued to be exercised under the Mexican government.

United States vs. Peralta, 19 How., 346.
Arguello vs. United States, 18 How., 457.
United States vs. Cambuston, 20 How., 63.

It may be contended that the change of sovereignty from Spain to Mexico, which is usually held to date from September, 1821, operated to revoke all power to alienate the public domain theretofore pos-

sessed by any local officers, and that no such power existed until created by subsequent acts of the new sovereignty. Substantially the same contention has already been made in this court in a recent case, but without success, and it should be equally unsuccessful in the present case. It that case the court held that it was true that a change of sovereignty implies a revocation of authority to local officers to dispose of the public lands, but it was pointed out that the new sovereign had made an order continuing the functions of the local officers.

Ely vs. United States, 171 U. S., 228 to 231.

There can be no doubt that the local authorities in New Mexico were among those whose functions were continued by the plan of Iguala and the order of the provisional council which is quoted in the case just cited.

Reynolds, Spanish law, 95.

While in the Ely case, it was an intendant whose authority the court upholds, yet the decision is equally applicable to a governor or political chief of New Mexico, as New Mexico was never put under any intendant, but was specially excepted when the intendants were created.

Ordenanzas de Intendentes, Art. X.

Moreover, the history of the country shows that the local authorities in New Mexico continued to exercise the power of making grants although it must be admitted that there does not appear to have been a large number made between 1821 and the date of the passage of the colonization law in 1824.

At the first glance it might appear that the case of *Hays vs. United States*, 170 U. S., 643, is a precedent against the claim in the present case, but examination will show this not to be so. In that case the court held that it was manifest that the necessary effect of the decree of July 6, 1824, which declared New Mexico a

territory, the colonization law of August 18, 1824, and the constitution of October 24, 1824, was to deprive the officials of a territory of power to dispose of public lands. The grant then under discussion was made in March, 1825.

None of these considerations are applicable to the present case, as our grant was made before the said laws or constitution came into existence; and the date of the governor's order, as recited in the act of possession, falls within the period when New Mexico appears to have been a state. It was so declared to be on January 31, 1824; and on July 6, 1824—perhaps illegally—made a territory; but by the constitution of October 24, 1824, it was certainly made a territory, and so ever after remained. The grant now presented was made in the latter part of February, 1824, and the juridical possession was delivered at some unascertained time prior to September 22, 1824, on which latter day the act of possession is dated at Abiquiu at considerable distance from the land granted

IV.

The presence of the act of juridical possession in the official archives, coupled with the fact of undisturbed possession under the grant, creates a presumption that the proceedings of the alcalde were approved by the political chief.

The statement of this proposition will undoubtedly at once call to mind a recent case in this court where there was an attempt by counsel for claimants to invoke such a presumption, but without success. In that case, however, it will be found that the alcalde commissioned for the purpose of delivering possession, states in his official act that he transmits his certificate to the superior authority in order that upon examination it might be decided as might be deemed just. The court held that the great difference between the

amount of land asked for and that delivered by the alcalde was such as to preclude any presumption of approval, based upon insufficient evidence of inadequate possession.

Bergere vs. United States, 168 U. S., 70 to 74.

In the present case it is to be noted that the alcalde who delivered the possession, certified that he delivered the act of juridical possession to Jose Rafael Samora as the principal party interested, and also states that the parties are to present the document to the political chief in order that he may approve, reform or decide what he might consider proper. Thus we find the certificate delivered to one of the grantees, and the next knowledge we have of it is that it forms a part of the official archives of the Mexican government where it has been certainly since the cession of the country to the United States. The indications are that Samora performed his duty by transmitting the paper to the political chief. When we remember that the settlers remained in possession of the lands granted for nearly 24 years before the Mexican government lost control over the country, without disturbance of any kind from the official authorities, it seems impossible to resist the conviction that the act of the alcalde was ratified and approved. But even if the political chief failed to act in the matter, that can not be imputed to Samora and his associates as a fault, but it must be held that the title granted was one which gave the right of possession and a right of property, certainly until some action was taken by the proper authorities against it. This principle has been many times recognized by this court in its decisions as to inchoate and imperfect titles. If no denouncement were made, no forfeiture declared, or no eviction had, by the authorities of the former government before the date of the treaty by which the country passed to the United States, the rights of owners were fixed by the treaty and it became too late for any such denounce-

ment, forfeiture or eviction at the hands of our
ment.

Fremont vs. United States, 17 How., 5
United States vs. Cervantes, 18 How.,
United States vs. Reading, 18 How., 6
United States vs. Noe, 23 How., 317.

It is respectfully submitted that there is ar
contradicted evidence to sustain the grant clai
that the decree of the court of private lan
should be reversed.

F. W. CLANCY,
Counsel for App

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